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No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

SEQUOIA BOOKS, INC.,

Petitioner,

v.

STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS SECOND DISTRICT

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QUESTIONS PRESENTED

1. Whether a search warrant document, which resulted in the seizure of 377 different magazines, is constitutionally sufficient where probable cause for obscenity is tied to the depiction of a single sexual act.

2. Whether a prior adversary hearing is constitutionally required when a search warrant authorizes the confiscation of an unlimited number of magazines, which are purportedly obscene because they contain a depiction of a single sexual act.

3. Whether a search warrant which predetermined obscenity and authorized executing officers to take any magazine that contained a depiction of a single sexual act is a constitutionally invalid general warrant.

4. Whether legislative enactments establishing adult uses are relevant, probative evidence of contemporary community standards in the determination of obscenity.

5. Whether contemporary community standards are to be applied to the value element of the tripartite test for obscenity articulated in *Miller v. California,* 413 U.S. 15 (1973).

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS SECOND DISTRICT

Petitioner, Sequoia Books, Inc., prays that a writ of certiorari issue to review the judgments and opinions of the Appellate Court of the State of Illinois, Second District, entered on July 9, 1986, and August 11, 1986.

OPINION BELOW

The opinions of the Appellate Court of the State of Illinois, Second District, which the Court is asked to review on a consolidated basis, are reported at 145 Ill.App.3d 1054, 495 N.E.2d 1292 (1986), and 146 Ill.App.3d 1, 496 N.E.2d 740 (1986). Copies of the opinions are included in the Appendix as Exhibits A and B.

JURISDICTION

Jurisdiction in this case is premised upon 28 U.S.C. § 1257(3) for review by certiorari of two decisions of the Illinois Appellate Court for the Second District. Pursuant to Supreme Court Rule 19(4), petitioner is consolidating two cases in applying for review before this Court since both parties in the two proceedings are identical and identical or related questions are presented for the Court's consideration.

In the first case, the Illinois Appellate Court issued a written opinion on July 9, 1986, and rehearing was denied by the court on August 19, 1986, a copy of which denial is included in the Appendix as Exhibit C. In the second case, the appellate court's written opinion was entered on August 11, 1986, and rehearing was not sought by the petitioner. In both cases the petitioner sought leave to appeal to the Illinois Supreme Court, and on December 4, 1986, its petitions were denied in each case. Copies of the orders denying leave to appeal are included in the Appendix as Exhibits D and E. Petitioner filed affidavits of intent to seek review in the United States Supreme Court, and motions to

stay the mandates, with the Illinois Supreme Court. On December 26, 1986, its motions were granted. Copies of the Illinois Supreme Court's orders staying the mandate are included in the Appendix as Exhibits F and G.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the First, Fourth and Fourteenth Amendments to the Constitution of the United States, and the Illinois Obscenity Statute, Ch. 38, § 11-20, Ill.Rev.Stat. (1983), are set forth in the Appendix as Exhibits H and I.

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STATEMENT OF THE CASE

The petitioner in each of the cases where review is sought before this Court on a consolidated basis is Sequoia Books, Inc., the corporate owner and operator of the Denmark Bookstore, an adult bookstore located at 1300 Business 30 West, Aurora, Illinois. The bookstore restricts admittance to adults over the age of 18 years. Both cases stem from criminal charges filed against petitioner by the People of the State of Illinois under the Illinois Obscenity Statute, Ch. 38, § 11-20, Ill.Rev.Stat., for the sale of alleged obscene magazines.

In the first case, on January 23, 1984, Robert Wunsch, the Chief of Police for the Village of Oswego, went to the Denmark Bookstore premises and browsed through maga-

zines on the racks at the bookstore. He subsequently purchased two magazines entitled "Golden Girls" and "Illegal Entry". Wunsch left the bookstore and met with Timothy McCann, a Kendall County Sheriff's Deputy, and provided information and assisted in preparing a complaint and affidavit for a search warrant of the bookstore. Wunsch's affidavit described his law enforcement authority, the location of the bookstore, the two magazines he had purchased that same day, as well as allegations as to his observations at the bookstore of three other magazines which contained depictions of "cunnilingus, fellatio, and intercourse, excretion from semen from penis onto other persons, masturbation." A second affidavit was prepared and executed by McCann, which recited that other criminal charges had been filed in the county for violation of the obscenity statute, arising out of the purchase of magazines from the Denmark Bookstore.

A complaint for search warrant and the two affidavits, along with the two magazines purchased by Wunsch, were presented to a state court judge, who issued a search warrant, directing the seizure of:

> Magazines containing depictions or portion thereof of the following: Cunnilingus, fellatio, anal intercourse, or anal insertion of prosthetic devices, insertion of tongue into anus.

Copies of the affidavits, complaint for search warrant, and the search warrant, are included with the appellate court's opinion in this case, Exhibit A of the Appendix to this petition.

Police officers executed the search warrant and seized in excess of 375 magazines from the Denmark Bookstore. In ascertaining which magazines were to be seized as evi-

dence, the officers leafed through the magazines to see if the described acts from the search warrant were within it. The time required for the review of each magazine was a matter of seconds, and in some instances, a review of the magazine cover only sufficed.

On January 25, 1984, the petitioner was charged by criminal complaint with obscenity on the basis of the magazines listed in a search warrant inventory. The complaint was first amended to charge 48 separate counts of obscenity, and was then later amended to a 10-count complaint.

Prior to trial a motion to quash the search warrant, suppress items seized, and order return, was filed, asserting the procedure of the search and seizure was constitutionally defective. The petitioner contended the warrant was a general warrant which lacked specificity and which was overbroad by authorizing seizure of magazines depicting specified sexual conduct without setting forth the tripartite test for determining obscenity. The petitioner also asserted a failure of the issuing judge to focus on the alleged obscenity of the two magazines presented, and a claim that the search and seizure was designed to suppress all sexually explicit material and close the bookstore, thereby constituting an invalid prior restraint. The trial court denied the motion to suppress.

The petitioner also filed a pretrial motion to dismiss, contending the Illinois Obscenity Statute was unconstitutionally vague, indefinite, uncertain and overbroad, thereby violating petitioner's First and Fourteenth Amendment rights. Included within petitioner's constitutional assertions was an allegation that the statute failed to require that the third prong of the tripartite test for obscenity be

adjudged on an objective basis, and not on the basis of contemporary community standards. The motion to dismiss was denied by the trial court.

The case first came to trial on 10 counts of obscenity. After deliberating on the evidence presented, the jury was unable to reach a unanimous decision and a mistrial was declared. The case was then retried, but prior to trial the State again amended the criminal complaint, reducing the counts to only three. At the retrial of the case, the petitioner was found guilty of the offense of obscenity on each of the three counts. Petitioner's trial motion for directed verdict and a timely post-trial motion preserving the constitutional issues on the search and seizure and the Illinois Obscenity Statute were denied by the trial court.

Petitioner appealed to the Second District Appellate Court for the State of Illinois, and that court affirmed the judgment of the trial court and subsequently denied its petition for rehearing.

In rejecting the petitioner's assertions regarding probable cause for issuance of the search warrant, the appellate court relied on *New York v. P.J. Video,* — U.S. —, 106 S.Ct. 1610 (1986). The court held that based upon the totality of the circumstances there was sufficient information presented to the judge to justify the issuance of the warrant. The petitioner's contentions on the generality of the warrant because of the failure to particularize the items to be seized was also rejected. The court relied on *Sequoia Books v. McDonald,* 725 F.2d 1091 (7th Cir. 1984), as controlling authority, although not binding on the state court, but failed to give equal weight to *U.S. v. Guarino,* 729 F.2d 864 (1st Cir. 1984), which reached a contrary decision from

Sequoia. The court held that *Lo-Ji Sales Inc. v. New York,* 442 U.S. 319 (1979), was factually distinguishable because it involved the authorization for the seizure of "obscene materials". In summary, the court noted that while on its face the warrant language might appear to be general, compared to general warrants of the past, the *ad hoc* determinations of obscenity sought to be prevented were accomplished in the instant case. The court stated this was a search for evidence and was a seizure of items depicting specific sexual conduct which, by prior judicial determination, was likely to meet the three-prong obscenity test.

The appellate court also held that the Illinois Obscenity Statute had consistently withstood constitutional attack. The court noted that in its prior decision in *People v. Pope,* 138 Ill.App.3d 726, 486 N.E.2d 350 (1985), cert. granted as *Pope v. Illinois,* — U.S. —, 107 S.Ct. 61 (1986), it had rejected arguments regarding the vagueness and overbreadth of the statute, and in the absence of any new argument, its prior rulings would not be altered.

The second case being presented for review before this Court also involves the Denmark Bookstore premises. On October 23, 1984, an Oswego Village police officer purchased two magazines at the store entitled "Here's the Beef" and "Student Bodies". On October 24th the officer returned to the store and purchased a third magazine, "Two Way Swingers". Criminal complaints were filed as to each magazine against the petitioner.

The petitioner's pretrial motion to dismiss, which included the same constitutional assertions regarding the Illinois Obscenity Statute as the motion in the first case, was denied by the court. After a jury trial, petitioner was

found guilty of the offense of obscenity as to each magazine. During its case at trial, the petitioner tendered exhibits of five adult use ordinances from various local governmental bodies throughout Illinois. A copy of one of the tendered exhibits, the adult use ordinance from the City of Chicago, is included in the Appendix as Exhibit J. These exhibits were presented as evidence of contemporary community standards pursuant to Ill.Rev.Stat., Ch. 38, § 11-20(c)(4). The trial court sustained the State's objection to these exhibits on the basis of relevancy.

Petitioner's trial motion for directed verdict and timely post-trial motion preserved the constitutional issues relating to the constitutionality of the Illinois Obscenity Statute, and the trial court's error in rejecting the tendered exhibits of adult use ordinances.

The petitioner appealed to the Second District Appellate Court for the State of Illinois, and that court affirmed the judgment of the trial court. The court relied on its prior decision in *People v. Sequoia* (the joint case in this consolidated petition) in rejecting the petitioner's assertions as to the Illinois Obscenity Statute. With regard to the petitioner's assertions on the refusal of the tendered exhibits of adult use ordinances, the court held that the ordinances addressed zoning problems and therefore they did not reflect any judgment on the public acceptance of materials such as those on trial.

The petitioner sought timely leave to appeal in each of these cases. On December 4, 1986, the Illinois Supreme Court denied its petitions. The mandate of the Illinois Supreme Court was stayed in each case pending review by this Court.

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REASONS FOR GRANTING THE WRIT

I.

The Search Warrant Procedure Utilized In This Case Was Constitutionally Invalid Because It Constituted A General Warrant, There Was No Searching Focus On The Issue Of The Obscenity Of The Magazines To Be Seized, And The Seizure Amounted To A Prior Restraint.

This case presents egregious factual circumstances where police officers conducted a massive search and seizure that imposed a system of prior restraint on the petitioner's bookstore. For over 25 years, this Court has condemned large scale search and seizure operations, where First Amendment interests of liberty of expression are involved.

Beginning with *Marcus v. Search Warrants of Property*, 367 U.S. 717 (1961), this Court established fundamental principles that in large-scale seizures the Constitution dictates the requirement of an adversary hearing on the question of obscenity prior to the seizure. In *Marcus*, the complaint for search warrant was supported by an affidavit in which the police officer advised the court that he had reviewed materials at newsstands and that at certain locations obscene publications were available. In striking down the warrant procedure, this Court noted that the search warrants utilized merely tracked the language of the statute, with no publications specified, thus leaving individual judgment as to the obscenity of the publications to the police officers.

A few years later, in *A Quantity of Copies of Books v. State of Kansas*, 378 U.S. 205 (1964), the Court addressed a Kansas procedure where the state court judge reviewed

seven books, concluded they were obscene, then issued a warrant that allowed for the seizure of any books with a designation "original Night Stand book". The execution of the warrant resulted in the seizure of 1,715 books. In finding the procedure constitutionally infirm, this Court held that the authorization of the warrant which permitted seizure of all copies of such a designation, was violative of the *Marcus* principles.

In *Stanford v. Texas,* 279 U.S. 476 (1965), just one year later, the Court addressed a warrant procedure involving books and other written documents pertaining to allegations of Communist activity, and concluded that:

> [H]istory indispensably teaches . . . that the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain . . . No less a standard could be faithful to First Amendment freedoms.
>
> 279 U.S. at 485.

During the next decade, the Court continued to recognize the responsibility of courts to scrutinize large-scale books, films, and other materials presumptively protected under the First Amendment. *Lee Art Theatre, Inc. v. Virginia,* 392 U.S. 636, 637 (1968); *Heller v. New York,* 413 U.S. 483, 491 (1973); *Roaden v. Kentucky,* 413 U.S. 496, 501 (1973).

The Court's holding in *Lee Art Theatre* is particularly instructive in reviewing the present case. The Court found a search warrant affidavit constitutionally insufficient under the First and Fourth Amendments because it described

a motion picture film that a police officer had reviewed in conclusory terms as being obscene. The import of *Lee Art Theatre* requires a judge faced with the task of finding probable cause for the issuance of a search warrant to be afforded a factual basis to focus searchingly on the issue of obscenity. 392 U.S. at 637.

The Court applied all of these principles in *Lo-Ji Sales Inc. v. New York,* 442 U.S. 319 (1979), where the Court reviewed a warrant procedure which it ultimately condemned as an impermissible general warrant. In *Lo-Ji Sales,* a warrant was issued based on an affidavit of a law enforcement investigator, which asserted that similar films to the two reviewed by the judge were found on the premises. The search warrant issued was open-ended, with no specific items listed. The language of the warrant even anticipated that the judicial officer was going to the bookstore to review "similar" films. The Court held the warrant left "it entirely to the discretion of the officials conducting the search to decide what items were likely obscene and to accomplish their seizure", and concluded that the Fourth Amendment did not permit "open-ended warrants". 442 U.S. at 325.

The requirements of heightened scrutiny of search and seizure procedures presenting the combination of these constitutional issues remains today. In *Maryland v. Macon,* — U.S. —, 105 S.Ct. 2778 (1985), this Court stated:

> The First Amendment imposes special constraints on searches for and seizures of presumptively protected materials . . . and requires that the Fourth Amendment be applied with 'scrupulous exactitude' in such circumstances . . . Consequently, the Court has imposed particularized rules applicable to searches for

> and seizures of allegedly obscene films, books, and papers.
>
> — U.S. at —, 105 S.Ct. at 2781-2782 (citations omitted).

Most recently, in *New York v. P.J. Video,* — U.S. —, 106 S.Ct. 1610, 1614 (1986), the Court reiterated the long-standing concern and requirement of special conditions on seizures involving First Amendment implications.

In *P. J. Video,* the Court was addressing the standard of probable cause for issuance of a warrant involving seizure of materials presumptively protected by the First Amendment. In reversing the New York Court of Appeals decision, this Court held that prior decisions did not dictate a higher standard in making a probable cause determination. Rather, as set forth in *Heller v. New York,* the requirement was that probable cause must be determined to safeguard First Amendment interests, and that the protection enunciated in cases such as *Roaden, A Quantity of Books, Heller, Marcus* and *Lee Art Theatre* were adequate to ensure there is no impairment of the First Amendment interests.

The Court in *P. J. Video* then reviewed whether, under the standard set forth in *Illinois v. Gates,* 462 U.S. 213 (1983), there was sufficient evidence before the issuing magistrate to establish probable cause that the films were obscene. The affidavits attached to the complaint for search warrant described five videocassette movies viewed at the respondents' store, setting out the content and character of each movie. In finding the affidavits sufficient to establish probable cause, the Court concluded:

> Respondents concede that the affidavits describing the five films adequately established probable cause with

> respect to the second of the three elements of obscenity under the statute, namely, that the movies depicted 'in a patently offensive manner' the various kinds of sexual conduct specified in the statute . . . Our review of the affidavits convinces us that the issuing justice also was given more than enough information to conclude that there was a 'fair probability' that the movies satisfied the first and third elements of the statutory definition, namely, that the 'predominant appeal [of the movies] is to the prurient interest in sex,' and that the movies 'lac[k] serious literary, artistic, political, and scientific value.'
>
> — U.S. —, 106 S.Ct. at 1616.

In accordance with the requirements of *Marcus, Quantity,* and *Lee Art Theatre,* the Court determined that the affidavit provided a factual basis to focus solely on the issue of obscenity, utilizing a standard of probable cause.

In the present case, none of the requirements set forth by this Court's long line of search and seizure cases involving First Amendment interests were met. There was not sufficient evidence before the issuing judge to establish probable cause that the materials to be seized were obscene under the statutory definition for obscenity. Although the issuing judge reviewed two magazines himself, and therefore under *Lee Art Theatre* could have had a sufficient factual basis to focus searchingly on those magazines and order their seizure as evidence, that was not the procedure followed. Unlike *P. J. Video,* where the warrant was for the seizure of the five movies reviewed in the affidavit, in the instant case the executing officers were issued a blank check in the form of a warrant which authorized the seizure of any material containing depictions or descriptions of any one of several sexual acts.

Certainly, a warrant which permitted seizure of a magazine which contained one depiction of specified conduct would not establish probable cause that the material to be seized under the warrant was obscene. That premise was rejected long ago in *Quantity,* when this Court held that the description of a book as "An Original Night Stand" book was wholly insufficient to establish probable cause as to its obscenity. The probable cause requirement as to each magazine relates to the obscenity *vel non* of the magazines to be seized, and the concept requires a focus on each of the three elements. Under the factual circumstances of the instant case, there was no information before the issuing judge as to the general theme, serious value, or other elements to be considered, on the items the warrant authorized. In short, there was nothing which would have allowed the judge to determine whether there was a fair probability that the three elements of the Illinois statutory definition of obscenity were met.

As in *Quantity,* in the present case there was no opportunity for the judge to focus searchingly on the obscenity of the materials to be seized, because the only information before the court were affidavits concerning two magazines and a general assertion that other materials were present at the bookstore location which contained certain depictions of sexual conduct. The *per se* obscenity determination that occurred in this case is not the type of focus required by a neutral and detached judicial officer under the prior opinions of this Court. In *Marcus,* this Court specifically noted that the issuing judge had not scrutinized any of the material that was considered to be obscene, and the warrants merely tracked the language of the statute, with no publications specified.

The officers in the instant case were given total discretion in deciding what items could be seized under the warrant, which is totally contrary to the principles of *Marcus* and *Lo-Ji Sales*. Even the appellate court in the opinion below acknowledged that the search warrant might be "general", but erroneously concluded that there was a fair probability that material containing certain depictions of sexual conduct was obscene. Determining what is or is not obscene is not a simple task. Separating that which is protected from that which is not requires "sensitive tools", *Speiser v. Randall,* 357 U.S. 513, 525 (1958), and a general warrant such as utilized in this case is not a sensitive tool. The search warrant in the present case, authorizing the seizure of materials containing depictions of certain specified sexual conduct, is no different than the warrant language authorizing the seizure of "obscene" materials condemned by this court in *Marcus* and the other reviewed decisions of the Court.

Perhaps the most glaring constitutional deprivation to petitioner under the circumstances surrounding this search and seizure procedure is the clear imposition of a system of prior restraint. Under the general warrant issued, and with the discretion left to the police officers executing the warrant, the issuing judge could not have predicted in any manner the extent of the seizure that would ultimately be accomplished. It is obvious the focus of the entire procedure was to economically damage the bookstore operation. Under the facts of the case, where 377 magazines are initially seized, with only three ultimately being the subject of a trial, an evidence-gathering claim cannot be advanced as a counter-argument to a prior restraint analysis. The

holdings of *Marcus, Quantity,* and *Lo-Ji Sales,* require that an adversary hearing precede the issuance of the warrant and the seizure that results. There is sound historical and constitutional disapproval for such procedures directed at instilling the type of economic disruption intended by the State in the instant case.

Petitioner submits that the holding of the appellate court in this case ignores the historical condemnation of general warrants and search and seizure procedures with First Amendment implications. The appellate court's holding cannot be squared with fundamental constitutional principles enunciated by this Court in a long line of cases. The analysis of application of those principles submitted by petitioner has been accepted by two circuits, *United States v. Guarino,* 729 F.2d 864 (1st Cir. 1984), and *United States v. Tupler,* 564 F.2d 1294 (9th Cir. 1977), which therefore are in conflict with the decision of the Illinois Appellate Court for the Second District. This Court should acknowledge the significance of the constitutional issues presented by this case and should grant certiorari.

II.

Adult Use Ordinances Constitute Relevant, Probative Evidence On The Issue Of Contemporary Community Standards Under The First And Fourteenth Amendments To The Constitution Of The United States.

In *Smith v. California,* 361 U.S. 147 (1959), this Court recognized the need for evidence of contemporary community standards in an obscenity case, and the opportunity for a defendant to address such evidence. The present case presents an important question of whether adult use ordinances from various local governmental bodies within

the State of Illinois constitutes relevant and probative evidence on the application of contemporary community standards.

In an obscenity case, the trier of fact must resolve whether the material on trial has acquired a level of acceptance by the general public. This determination is a relevant inquiry as to whether the material appeals to a prurient interest and is patently offensive. Therefore, the acceptance of such material in various other communities is evidence of contemporary community standards. Relevant evidence tending to shed light on community standards is therefore admissible. See *e.g. People v. Nelson*, 88 Ill.App.3d 196, 410 N.E.2d 476 (1980); *Saliba v. State of Indiana*, 475 N.E.2d 1181 (Ind.App., 1985).

The petitioner in the instant case tendered certified copies of adult use ordinances from five communities across the State of Illinois. These ordinances represented a public awareness and acceptance of materials such as those on trial and, indeed, defined the same class of materials. These ordinances permitted businesses to operate and sell materials such as those on trial, and the very enactment and existence of the ordinances establish a standard of acceptability of such materials.

Whether a county-wide or statewide standard is applied, evidence of this nature would give guidance to the trier of fact. The Illinois legislature even anticipated this by providing that:

> In any prosecution for an offense under this section, evidence shall be admissible to show:
>
> * * *

> (4) The degree, if any, of public acceptance of the material in this state.
>
> Ill.Rev.Stat. (1983), Ch. 38, § 11-20(c)(4).

The jury's factfinding function was undermined by the denial of the proffered relevant and material evidence.

In a case such as this, acceptability is of particular concern, for as Justice Harlan stated in *Smith v. California,* 361 U.S. 147 (Harlan, J. concurring in part and dissenting in part, 1959):

> The community cannot, where liberty of speech and press are at issue, condemn that which is generally tolerates. This being so, it follows that due process . . . requires a State to allow a litigant in some manner to introduce proof on this score. While a State is not debarred from regarding the trier of fact as the embodiment of community standards, competent to judge a challenged work against those standards, it is not privileged to rebuff *all* efforts to enlighten or persuade the trier.
>
> 361 U.S. at 171-172.

In many instances, particularly where a statewide standard is applied, as is the case in Illinois, jurors have little experience on which to base an opinion of what the contemporary community standard is. While evidence of availability does not inexorably translate to acceptability, the evidence would aid the trier of fact in its function.

This Court has recognized that evidence tending to show public policy serves a function of educating a trier of fact who must apply the concept of community standards within the definition of obscenity. In *Smith v. United States,* 431 U.S. 291 (1977) the defendant in a federal obscenity prosecution unsuccessfully contended that

the Iowa Obscenity Statute set forth the applicable community standards. The Court of Appeals for the Eighth Circuit affirmed the conviction and concluded that the issue of contemporary community standards was a federal question and was not to be determined on the basis of state obscenity law. The circuit court noted, however, the admission of the Iowa Obscenity Statute into evidence, but stated that:

> [T]his was designed to give the jury knowledge of the State's policy on obscenity when it determined the contemporary community standard.
>
> 431 U.S. at 299 (quoting Eighth Circuit).

This Court granted certiorari to review the relationship between state legislation regulating or refusing to regulate the distribution of obscene material, and the issue of contemporary community standards in a federal prosecution.

In discussing the relationship of state legislative enactments regarding obscenity to contemporary community standards, the Court in *Smith* noted that community standards provide the measure against which the jury decides the questions of appeal to prurient interest and patent offensiveness. The Court commented that such legislative enactments define the conduct regulated, and can vary in degree and approach. The Court concluded that states could adopt different approaches and "might add a geographic dimension to its regulation of obscenity through the device of zoning laws." 431 U.S. at 303. With respect to the introduction of the Iowa statute into evidence, the Court observed that:

> Even though the State's law is not conclusive with regard to the attitudes of the local community on ob-

> scenity, nothing we have said is designed to imply that the Iowa statute should not have been introduced into evidence at petitioner's trial. *On the contrary, the local statute on obscenity provides relevant evidence of the mores of the community whose legislative body enacted the law. It is quite appropriate, therefore, for the jury to be told of the law and to give such weight to the expression of the State's policy on distribution as the jury feels it deserves.*
>
> 431 U.S. at 307-308 (emphasis added).

Other jurisdictions have recognized that evidence of this type is an aid to the jury, and that it was error for a trial court to deny or reasonably limit a defendant's right to introduce competent exhibits which directly relate to any or all of the elements of the definition of obscenity. *United States v. Various Articles of Merchandise,* 750 F.2d 596, 599 (7th Cir. 1984); *State ex rel. Leis v. William S. Barton Company, Inc.,* 45 Ohio App.2d 249, 344 N.E.2d 342 (1975). Petitioner submits that the decision of the Illinois Appellate Court affirming the exclusion of the relevant, probative evidence on community standards, is in conflict with these decisions, as well as this Court's holding in *Smith v. United States,* meriting certiorari review.

The petitioner has a constitutional right to due process of law, which includes the presentation of evidence relevant to each of the elements of the offense charged. This is especially true in cases with First Amendment implications. *Roaden v. Kentucky,* 413 U.S. 496, 504 (1973). The petitioner submits that municipal or county adult use ordinances, such as those tendered as exhibits at the trial court, are the same type of relevant evidence approved by this Court in *Smith v. United States.* Clearly, those legislative enactments, even if classified as a regulation of ob-

scenity through zoning, are evidence of the "mores of the community whose legislative body enacted the law." The exclusion of this evidence violated the petitioner's rights under the First and Fourteenth Amendments to the Constitution of the United States. This Court should grant certiorari to resolve this issue.

III.

The Illinois Obscenity Statute Is Overbroad Because It Permits Community Standards To Be Implemented In The Value Element Of The Test For Obscenity.

The constitutionality of the Illinois Obscenity Statute is presently pending before this Court in *Pope v. Illinois,* cert. granted, — U.S. —, 107 S.Ct. 61 (1986). The issue presented in *Pope* focuses upon the overbreadth of the Illinois Obscenity Statute for its failure to limit application of contemporary community standards to the first two elements of the test for obscenity announced by this Court in *Miller v. California,* 413 U.S. 15 (1973).

In *Miller,* this Court had rejected the value element of "utterly without redeeming social value" that had been suggested by the plurality opinion in *Memoirs v. Massachusetts,* 383 U.S. 413 (1966). *Miller* retained elements of "prurient interest" and "patent offensiveness" but defined the value element on the basis of a work's serious value. The Illinois Supreme Court, in addressing the *Miller* standards, continued to adhere to the *Memoirs* value standard. See *People v. Ridens* (*Ridens II*), 59 Ill.2d 362, 321 N.E.2d 264 (1974). Indeed, the present case is one in which the "utterly" value element has been utilized both statutorily and in jury instructions.

In both *Miller v. California* and in *Smith v. United States,* 431 U.S. 291 (1977), this Court has emphatically declared that contemporary community standards apply only to the first two elements of the tripartite test for obscenity. *Miller,* 413 U.S. at 30, 34; *Smith,* 431 U.S. at 301-302. Lower courts have recognized and implemented these express holdings, and accordingly have limited community standards to the first two parts of the test for obscenity. *United States v. Heyman,* 562 F.2d 316 (4th Cir. 1977); *Penthouse International Ltd. v. McAuliffe,* 610 F.2d 1353 (5th Cir. 1980); *United States v. Bagnell,* 679 F.2d 826 (11th Cir. 1982); *United States v. Merrill,* 746 F.2d 458 (9th Cir. 1984), cert. denied — U.S. —, 105 S.Ct. 926 (1985); *State v. Princess Cinema of Milwaukee Inc.,* 96 Wis.2d 646, 292 N.W.2d 808 (1980); *State v. Bartanen,* 121 Ariz. 454, 591 P.2d 546 (1979).

Petitioner's overbreadth attack against the Illinois Obscenity Statute was specifically rejected by the Illinois Appellate Court on the basis of its reasoning in *People v. Pope,* 138 Ill.App.3d 726, 486 N.E.2d 350 (1985), cert. granted as *Pope v. Illinois,* — U.S. —, 107 S.Ct. 61 (1986). In essence, the court stated, therefore, that the Illinois Obscenity Statute permitted community standards to be utilized on the value element and interpreted the decisions of this Court to mean that such an application of community standards did not present constitutional shortcomings. Effective January 1, 1986, however, the Illinois General Assembly created a new obscenity definition that was consistent with this Court's express statements in *Miller* and *Smith* regarding community standards applying only to the first two elements of obscenity. Ill.Rev.Stat. (1985), Ch. 38, §§ 11-20, as amended effective January 1, 1986.

The Illinois Obscenity Statute, as it existed when Sequoia Books was convicted, was unconstitutionally overbroad. The magazines, *Jammed, Innocent Lesbians, Rough House, Student Bodies, Here's the Beef,* and *Two Way Swingers",* while not in the mainstream of American literature, were tested for obscenity based on a value element that was tied to community standards. The First Amendment requires an independent objective value test to measure the constitutional protection to be afforded these magazines. This Court's grant of certiorari in *Pope* acknowledged the constitutional importance of this question and therefore certiorari should be granted to address the question in this case.

—o—

CONCLUSION

This Court should grant a writ of certiorari to review the judgments and opinions of the Appellate Court of the State of Illinois, Second District, because of the significant issues presented under the First, Fourth and Fourteenth Amendments to the Constitution of the United States.

Respectfully submitted,

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February, 1987

APPENDIX

EXHIBIT A

No. 85-504

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

SEQUOIA BOOKS, INC.

Defendant-Appellant.

Appeal from the Sixteenth Judicial Circuit,
Kendall County, Illinois

Hon. Wilson Burnell Judge Presiding

(Filed July 9, 1986)

JUSTICE REINHARD delivered the opinion of the court:

Defendant, Sequoia Books, Inc., was charged in an amended information with 10 counts of obscenity (Ill. Rev. Stat. 1983, ch. 38, par. 11-20(a)(1)) involving the sale of certain magazines seized during a search pursuant to a warrant. Following a mistrial after the jury was unable to reach a verdict, defendant was then tried in a jury trial on only three counts and was found guilty of all three counts of obscenity. Defendant was fined $910.

Defendant raises the following issues on appeal: (1) whether the procedures utilized in obtaining and executing the search warrant were constitutionally sufficient where a large scale seizure was conducted; (2) whether the trial

court's non IPI instruction improperly instructed the jury to determine the community standard on the basis of their own observations in life in Illinois; and (3) whether the Illinois obscenity statute is unconstitutional because it is vague and overbroad and includes material that would appeal to lust alone which would appeal to the normal curiosity of an adult about sexual matters.

On January 23, 1984, Judge Rex Meilinger issued a search warrant for the Denmark Bookstore in Aurora, owned and operated by defendant, to search for evidence of the offense of obscenity in violation of section 11-20 of the Code of Criminal Procedure (Ill. Rev. Stat. 1983, ch. 38, par. 11-20). and seize any "[m]agazines containing depictions or portion thereof of the following: Cunnilingus, fellatio, anal intercourse, excretion of semen from penis onto other person, masturbation, vaginal or anal insertion of prosthetic devices, insertion of tongue into anus." (Reprinted in Appendix A.) Attached to the complaint for warrant were two affidavits. Robert Wunsch stated in his affidavit (reprinted in Appendix B) that he had visited deendant's bookstore and purchased two magazines entitled Illegal Entry and Golden Girls, each of which depicted more than one of the sexual acts described in the warrant. He also stated that while at the bookstore, he examined three other magazines, Anal Love, Anal Climax, and Hot Black Boxes, all of which depicted one or more of the acts described in the warrant. Deputy Sheriff Timothy McCann stated in his affidavit that numerous criminal charges have been filed under the obscenity statute "against various persons resulting from the purchase of magazines * * *" at defendant's bookstore. The issuing judge also received the two magazines purchased by Wunsch to examine prior to issuing the warrant.

Armed with the search warrant, Deputy McCann, along with Wunsch and three other officers, entered defendant's bookstore and seized over 375 magazines. Defendant, along with other codefendants who are not parties to this appeal or the trial below, were charged with obscenity for offering the magazines for sale. (Ill. Rev. Stat. 1983, ch. 38, par. 11-20(a)(1).) Defendant filed a motion to quash the search warrant and suppress the items seized, and to dismiss the complaint challenging the constitutionality of the obscenity statute.

On March 22, 1984, Judge Richard Larson entertained defendant's motions. In addition, the court heard similar motions to quash involving the same defendants and the execution of three different search warrants on three different occasions. Concerning the search of January 23, 1984, Robert Wunsch testified that he was the chief of police for the village of Oswego acting as a "special deputy" for Kendall County on January 23 when he entered the bookstore to purchase some magazines. He paid a fifty-cent browsing charge to a man behind the cashier's counter, later identified as Mr. Patroff. (Originally a defendant in this matter, Patroff was eventually convicted for obscenity in relation to another search as reflected in *People v. Patroff* (1986), 141 Ill. App. 3d 483, 490 N.E.2d 148.) Wunsch leafed through a number of magazines and was in the store for approximately 15 to 20 minutes. He stated that he was specifically looking for magazines which contained obscenity, as he defined it: "contained anal intercourse, excretion of semen onto another person, masturbation, insertion of the tongue into the anus." Wunsch also participated in the January 23 search. He estimated that he reviewed 50 or 60 magazines. When asked what he

was looking for in the magazines, he responded that he was looking for the specific sexual acts described in the warrant. Among the magazines he personally seized were two more copies of the magazines that he had previously purchased.

Deputy Sheriff McCann testified at the hearing that he participated in three searches of the bookstore pursuant to three warrants on three separate occasions. Specifically concerning the January 23 search, he stated that he gave Judge Meilinger the two magazines Wunsch had purchased at the bookstore. In describing the search procedure, McCann stated that the officers would browse through the magazines searching for depictions of the sex acts described in the warrant, if the cover photograph did not depict such acts, and then would give those containing the depictions to McCann who marked the magazines and placed them in boxes. Only one copy of each magazine was seized. McCann also stated that there were occasions during the search that he disagreed with another officer's determination that a magazine contained a depiction of a certain act and refused to seize the magazine. A magazine was seized simply on the basis of whether it contained a depiction of a sex act as described in the warrant. Other members of the search team also testified as to the search procedure. After hearing arguments on both motions, the court denied both the motion to quash the search warrant and the motion to dismiss the complaint.

Defendant was originally charged with two counts of obscenity. Later, the charges were increased by an amended information to 48 counts of obscenity pertaining to 24 specifically listed magazines. The State eventually reduced the number of magazines involved as well as the

number of counts charged to 10. Defendant proceeded to trial which resulted in a hung jury. Defendant was again tried before a jury. The State, however, chose to proceed on only three counts of the amended information while dismissing the remaining seven. Additionally, prior to proceeding in the second trial, the court accepted the stipulation that defendant owned and operated the bookstore, and on January 23, 1984, offered for sale three magazines, Jammed, Innocent Lesbians and Rough House, knowing the nature of the contents.

The testimony at trial is briefly summarized. Deputy McCann testified that he entered the bookstore on January 23 and identified photographs of the premises, including the sign on the front door which limited admittance to adults over 18 years old. He also identified the three magazines which were admitted into evidence and distributed to the jury for their examination. Michael Chiappetta, a licensed psychologist and social worker, testified on behalf of the State that the three magazines appeal to the prurient interests of the average adult and have no social redeeming value. Roderick Bell, a behavior and social scientist, testified on behalf of defendant that he conducted a public opinion poll concerning Illinois residents' view of sexually explicit magazines and submitted the result into evidence. Dr. Carl Hamann, a physician specializing in psychiatry, testified on behalf of defendant that the magazines would appeal to an average adult's natural curiosity concerning sex. John Breen, an investigator, testified on behalf of defendant that he purchased five magazines containing sexually explicit materials at various establishments around Illinois. The stores all had signs on the front doors limiting admittance to only adults 18 years of age or older.

At the instruction conference, the State tendered a modified version of Illinois Pattern Jury Instructions No. 9.57 (Illinois Pattern Jury Instruction, Criminal, No. 9.57 (2d ed. 1981) (hereinafter cited as IPI Criminal)) while defendant tendered its own modified version of IPI Criminal No. 9.57. Both instructions concerned the definition of obscenity. The trial court agreed with defendant's objection to the State's definitional instruction and accepted defendant's instruction. The court, however, modified defendant's instruction removing the following language:

> "In determining whether a magazine is obscene, you must not judge it by your own personal standards, even if you are personally offended by the material."

The court also chose to formulate its own instruction which was submitted to the jury over defendant's objection. The instruction stated:

> "In determining whether a magazine is obscene applying contemporary community standards you may consider the material in light of your collective observations in life in the State of Illinois, but you must not judge it by your own personal standards even if you are personally offended by the material."

The jury returned verdicts of guilty on all three counts of obscenity charged.

Defendant's initial contention is that the search and seizure procedure was not designed to focus searchingly on the issue of obscenity, but rather was designed as a prior restraint to seize the largest number of magazines possible that the officers believed to be obscene. In particular, it argues that the complaint for search warrant and the affidavits attached to it failed to provide sufficient information to support a finding of probable cause as to the obscenity of the material. Additionally, defendant asserts that the

search warrant failed to specify the items to be seized making the warrant a general warrant and leaving the executing officers with the ultimate determination of what items would be seized.

Defendant first argues that the issuing judge had insufficient facts to establish probable cause. Defendant admits that our recent decision in *People v. Patroff* (1986), 141 Ill. App. 3d 483, 490 N.E.2d 148, is dispositive of this issue. Although the fundamental principles of the first and fourth amendments as applied to the states through the fourteenth amendment require a heightened scrutiny of search and seizure procedures involving allegedly obscene materials because it constitutes a form of prior restraint (see *Maryland v. Macon* (1985), 472 U.S. —, 86 L.Ed. 2d 370, 105 S.Ct. 2778; *Lo-Ji Sales, Inc. v. New York* (1979), 442 U.S. 319, 60 L.Ed. 2d 920, 99 S.Ct. 2319, see also *Roaden v. Kentucky* (1973), 413 U.S. 496, 37 L.Ed. 2d 757, 93 S.Ct. 2796), an issuing judge acting upon a complaint for a search warrant authorizing the seizure of materials presumptively protected by the first amendment is still guided by the same standard of probable cause used to review warrants generally. (*People v. Patroff* (1986), 141 Ill. App. 3d 483, 487, 490 N.E.2d 148.) The test for probable cause is governed by common sense and the practical considerations of everyday life. (141 Ill. App. 3d 483, 487, 490 N.E.2d 148; *People v. Hobbs* (1978), 59 Ill. App. 3d 793, 799, 375 N.E.2d 1367.) The issuing judge must weigh the totality of all the facts before him when determining whether there is sufficient evidence to justify probable cause that an item is obscene. (*People v. Patroff* (1986), 141 Ill. App. 3d 483, 487, 490 N.E.2d 148; *People v. Foote* (1982), 104 Ill. App. 3d 581, 583-84, 432 N.E.2d 1254;

People v. Hobbs (1978), 59 Ill. App. 3d 793, 799, 375 N.E.2d 1367.) The judicial officer issuing the search warrant is not required to view the material to be seized in order to establish probable cause, as long as the supporting affidavits are specific and explicit and are not merely conclusional. *People v. Patroff* (1986), 141 Ill. App. 3d 483, 487, 490 N.E.2d 148; *People v. Hobbs* (1978), 59 Ill. App. 3d 793, 799, 375 N.E.2d 1367.

Defendant, relying on *Brockett v. Spokane Arcades, Inc.* (1985), 472 U.S. —, 86 L.Ed. 2d 394, 105 S.Ct. 2794, argues that a probable cause determination cannot be made without knowing about the whole of the material because all the elements of obscenity must be established on their own for material to be adjudged obscene. *Brockett,* however, did not involve a probable cause issue but simply examined the validity of a state's obscenity statute. (See 472 U.S. —, 86 L.Ed. 2d 394, 105 S.Ct. 2794.) Defendant's reliance on *United States v. Tupler* (9th Cir. 1977), 564 F.2d 1294, is also misplaced. In *Tupler,* the Ninth Circuit Court of Appeals invalidated a search warrant stating that the issuing magistrate did not have an adequate factual basis to determine whether the seized items were obscene. (564 F.2d 1294, 1297-98.) *Tupler,* however, involved a search warrant to seize films. The court concluded that the affidavits were insufficient to establish probable cause because they were not based on the contents of the entire film but simply based upon the pictures on the boxes which contained the films. (564 F.2d 1294, 1296-97.) No one had viewed the films prior to the issuance of the search warrant and the seizure of the films. (564 F.2d 1294, 1296.) Defendant also cites other out-of-state cases which we find are factually inapposite.

In deciding whether a search warrant should be issued, the issuing judge need not determine whether the materials in question are, in fact, obscene beyond a reasonable doubt. (See *New York v. P.J. Video, Inc.* (1986), 475 U.S. —, 89 L.Ed. 2d 871, 106 S.Ct. 1610.) Rather, the question is whether there exists probable cause to believe the materials are obscene. (*People v. Patroff* (1986), 141 Ill. App. 3d 483, 487, 490 N.E.2d 148; *People v. Hobbs* (1978), 59 Ill. App. 3d 793, 799, 375 N.E.2d 1367.) In this case, the complaint for search warrant requested authority to search the bookstore for instruments, etc., used in the commission of obscenity specifying that these instruments were magazines which contained depictions of cunnilingus, fellatio, anal intercourse, excretion of semen from the penis onto other persons, masturbation, vaginal or anal insertion of prosthetic devices, and insertion of the tongue into anus. (Reprinted in Appendix C.) The affidavit of Robert Wunsch, attached to the complaint, stated that he was in the bookstore, purchased two magazines containing depictions of the explicit sexual acts listed in the complaint, and viewed three other magazines which also contained some of these depictions, and that these magazines were offered for sale to the public. The two magazines which he purchased were also turned over to the issuing judge for his examination. Deputy McCann's affidavit, also attached, stated that numerous criminal charges under the obscenity statute were pending against various persons as the result of the purchase of materials from the bookstore. Although defendant argues that the information presented to the judge was only sufficient to establish the second prong "patently offensive representations," of the three prong obscenity test (for a specific description of the test, see *People v. Anderson* (1985), 130 Ill. App. 3d 318, 473 N.E.2d 1345,

aff'd (1986), 112 Ill. 2d 39, 490 N.E.2d 1263), we conclude that the issuing judge had sufficient information to determine that materials depicting the acts listed in the search warrant and exhibited in the two magazines not only were patently offensive representations, but also would probably appeal, as a whole, to the prurient interests based on contemporary community standards and would probably be without redeeming social value. (See *New York v. P.J. Video, Inc.* (1986), 475 U.S. —, 89 L.Ed. 2d 871, 106 S.Ct. 1610.) Based upon the totality of the circumstances, there is sufficient specific and explicit information presented to the issuing judge to justify the issuance of a warrant for the search of the bookstore for evidence of allegedly obscene magazines.

Defendant next argues that the search warrant did not sufficiently particularize the items to be seized and should have been quashed by the trial court as a general warrant. It argues that this search warrant allowed the executing officers to determine what magazines were obscene in direct violation of the fundamental principles set forth in *Marcus v. Search Warrants of Property* (1961), 367 U.S. 717, 6 L.Ed. 2d 1127, 81 S.Ct. 1708, and those decisions following it. (See *Maryland v. Macon* (1985), 472 U.S. —, 86 L.Ed. 2d 370, 105 S.Ct. 2778; *Lo-Ji Sales, Inc. v. New York* (1979), 442 U.S. 319, 60 L.Ed. 2d 920, 99 S.Ct. 2319; *A Quantity of Copies of Books v. State of Kansas* (1964), 378 U.S. 205, 12 L.Ed. 2d 809, 84 S.Ct. 1723.) It also points out that Illinois recognizes the impropriety of general warrants. (See *People v. Kimmel* (1966), 34 Ill. 2d 578, 217 N.E.2d 785, *People v. Bates* (1976), 39 Ill. App. 3d 259, 350 N.E.2d 44; *People v. Gifford* (1975), 26 Ill. App. 3d 272, 325 N.E.2d 81.) The State responds, relying on *Sequoia*

Books, Inc. v. McDonald (7th Cir. 1984), 725 F.2d 1091, that the search warrant was constitutionally sound because the items to be seized were particularly described in the most feasible way possible. Defendant replies, however, that *Sequoia Books* is not controlling authority and should be given the same weight as *United States v. Guarino* (1st Cir. 1984), 729 F.2d 864, which defendant argues is expressly contrary to the decision in *Sequoia Books*.

The cases relied upon by defendant, however, are factually distinguishable from the facts in this case. The search warrants described in the decisions relied on by defendant generally involves the authorization for the seizure of "obscene materials." (See *Lo-Ji Sales, Inc. v. New York* (1979), 442 U.S. 319, 60 L.Ed. 2d 920, 99 S.Ct. 2319; *Marcus v. Search Warrants of Property* (1961), 367 U.S. 717, 6 L.Ed. 2d 1127, 81 S.Ct. 1708). For example, *Guarino* involved a search warrant authorizing the seizure of "a quantity of obscene materials." (729 F.2d 864, 865.) Nothing in the search warrant defined "obscene materials" allowing the executing officers to seize any items which in their opinion were obscene. 729 F.2d 864, 865-69.

On the other hand, *Sequoia Books* presents strikingly similar facts to this case. Not only did the case involve the same bookstore, the warrant there authorized the seizure of nine specific magazines and also magazines depicting: "cunnilingus, fellatio, anal intercourse, vaginal intercourse, excretion of semen from the penis onto other person, masturbation, vaginal and anal insertion of prosthetic [sic] devices, insertion of tongue into anus." (725 F.2d 1091, 1093.) The court found that confining the officers to seizing materials containing these graphic depictions of sexual conduct satisfied the requirements of particular de-

scription. (725 F.2d 1091, 1093.) It reasoned that the seizure was temporary for evidentiary purposes and not permanent for destruction purposes. The determination of obscenity was not left to the executing officers because the officers were looking for specific depictions in the materials and not for items generally described as "obscene" materials. (725 F.2d 1091, 1093-94.) The purpose was simply to obtain evidence. 725 F.2d 1091, 1094.

A review of the warrant in this case indicates that it is factually analogous to the warrant in *Sequoia Books*. The warrant here authorized the officers to seize only magazines which contained one or more of the explicit sexual acts described in the warrant, and, in fact, the officers only seized a copy of each magazine. The purpose of the search in this case was not to suppress materials, but was to obtain evidence of an alleged criminal offense.

Although *Sequoia Books* is a decision not binding upon this court (*City of Chicago v. Groffman* (1977), 68 Ill. 2d 112, 118, 368 N.E.2d 891), we find that the reasoning of the Seventh Circuit is sound and persuasive. Underlying the reasoning of the decisions involving the requirement that the items to be seized must be particularly described is the prevention of general, exploratory searches by executing officials with unfettered discretion. (See *Lo-Ji Sales, Inc. v. New York* (1979), 442 U.S. 319, 325, 60 L.Ed. 2d 920, 927-28, 99 S.Ct. 2319; *Standford v. Texas* (1965), 379 U.S. 476, 485-86, 13 L.Ed. 2d 431, 437, 85 S.Ct. 506, 512; *United States v. Guarino* (1st Cir. 1984), 729 F.2d 864, 867; *Sovereign News Co. v. United States* (6th Cir. 1982), 690 F.2d 569, 576; *United States v. Espinoza* (4th Cir. 1981), 641 F.2d 153, 165; *In re Property Belonging to Talk of the Town Bookstore, Inc.* (9th Cir. 1981), 644 F.2d 1317, 1318;

Randall Books Corp. v. Maryland (1985), 64 Md. App. 589, 497 A.2d 1174, 1180.) The language of the search warrant here may initially appear to be general; however, when compared to the "general" warrants of the past, we conclude that the conduct intended to be prevented, that is the *ad hoc* determinations of obscenity by law enforcement personnel suppressing first amendment rights, is accomplished by this search warrant because it is a search for evidence and a seizure of items depicting certain explicit sexual conduct which, by prior judicial determination, indicates a fair probability that they meet the three prong obscenity test. Under the facts presented in this case, we find the search warrant constitutionally sufficient.

Defendant's next contention is that the submission of Court's Instruction No. 1, a non IPI instruction, constituted reversible error because it improperly permitted the jury to apply their own sense of "community standards," not based on the evidence in the case, in deciding the issue of obscenity. It apparently argues that the instruction allowed the jury to determine whether the magazines at issue were obscene based upon the personal standards of others in direct contradition of this court's rulings in *People v. Hart* (1981), 101 Ill. App. 3d 343, 427 N.E.2d 1352, and *People v. Nelson* (1980), 88 Ill. App. 3d 196, 410 N.E.2d 476.

The instruction issued by the court stated:

> "In determining whether a magazine is obscene applying contemporary community standards you may consider the material in light of your collective observations in life in the State of Illinois, but you must not judge it by your own personal standards even if you are personally offended by the material."

Defendant correctly points out that an obscenity determination must be accomplished through the application of a contemporary statewide community standard while avoiding the utilization of any personal standards. (See *People v Ridens* (1974), 59 Ill. 2d 362, 371, 321 N.E.2d 264; *People v. Morrison* (1985), 138 Ill. App. 3d 595, 601, 486 N.E.2d 345.) Defendant's interpretation that the instruction improperly allowed the jury to determine whether the magazines were obscene based upon the personal standards of their friends, relatives, or acquaintances, or upon something they had read or seen, however, is inaccurate. It would appear that defendant is arguing that a jury must depend solely upon the evidence submitted to it when determining the "statewide community standard" they will follow and may not rely on common sense or experiences in life in arriving at the applicable community standard in the State. In essence, defendant would require the jury to accept its surveys and experts' opinions as establishing the statewide community standard. This proposition is unsupported. The determination of what the statewide community standard is not a question of law for a court to set, but a question of fact for a jury to decide (*cf. People v. Pope* (1985), 138 Ill. App. 3d 726, 741-42, 486 N.E.2d 350); and the members of a jury are generally instructed to examine the evidence in "light of your own observations and experience in life." (IPI Criminal No. 1.01 [10].) Defendant attempts to support its interpretation with authority is unsuccessful. In *People v. Nelson* (1980), 88 Ill. App. 3d 196, 410 N.E.2d 476, this court determined that it was error to refuse survey evidence of Illinois residents' views of sexually explicit materials to assist the jury in determining the community standard. (88 Ill. App. 3d 196, 198-200, 410 N.E.2d 476.) In *People v. Hart* (1981), 101 Ill. App. 3d

343, 427 N.E.2d 1352, the court ruled on the propriety of an instruction informing the jury of the State's nonduty to establish the community standard. (101 Ill. App. 3d 343, 350-51, 427 N.E.2d 1352.) Although it noted that jurors reliance on their "*own* observations and *own* experiences in life" because of the lack of evidence establishing the community standard is not the statewide standard to be applied (101 Ill. App. 3d 343, 350, 427 N.E.2d 1352 (emphasis supplied)), the court, as in *Nelson*, did not prohibit a jury from relying on its own collective experiences in applying the statewide standard to the materials.

A non IPI instruction should be used only if a pattern instruction does not contain an accurate instruction on the subject that the jury should be instructed upon and if the tendered non IPI instruction is simple, brief, impartial and free from argument. (87 Ill. 2d R. 451(a); *People v. Haywood* (1980), 82 Ill. 2d 540, 545, 413 N.E.2d 410.) Jury instructions, however, should not be misleading or confusing (*People v. Pope* (1985), 138 Ill. App. 3d 726, 740, 486 N.E.2d 350); and jurors are considered properly instructed if all the instructions construed together informed them of the applicable law. (*People v. Morrison* (1985), 138 Ill. App. 3d 595, 599, 486 N.E.2d 345.) The decision whether to give a non IPI instruction is within the discretion of the trial court. *People v. Pope* (1985), 138 Ill. App. 3d 726, 740, 486 N.E.2d 350.

Although the phrase "you may consider the material in light of your collective observations in life" is repetitive of IPI Criminal No. 1.01[10] and unnecessary, it is not misleading so as to cause harm. We note that the jury was also instructed with a non-IPI instruction on the definition of obscenity formulated by defendant:

"A magazine is obscene if:

(1) the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, that is, a shameful or morbid interest in nudity, sex, or excretion; and

(2) the work depicts or described, in a patently offensive way, sexual conduct of the kind cited in the following examples:

(a) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated;

(b) patently offensive representations or descriptions of masturbation, excretory functions and lewd exhibition of the genitals; and

(3) the material is utterly without redeeming social value.

You must find that all three elements exist in each magazine for it to be obscene.

Your verdict must be based on the evidence and testimony in this case and your determination of community standards for the State of Illinois; that is, how the magazine would be viewed by ordinary adults in the whole state rather than by the people in any single city or town or region within the State."

The last paragraph of that instruction is a modification of the last paragraph of IPI Criminal No. 9.57. Where an IPI instruction is applicable, it should be given. (87 Ill. 2d R. 451(a); *People v. Haywood* (1980), 82 Ill. 2d 540, 545, 413 N.E.2d 410.) Thus, there was no reason to modify the last paragraph of IPI Criminal No. 9.57. IPI Criminal No. 9.57 properly informs the jury that they are to consider how the material would be viewed by ordinary adults in the whole State rather than by people in any single city or

region. This, of course, is sufficient to inform the jurors that they cannot use their own personal standards in determining whether the materials are obscene. By giving this instruction as modified by defendant, which appears to state that the determination of community standards must be based only on the evidence and testimony, the instruction incorrectly implies that the jury may consider only evidence of community standards such as defendant's opinion survey, and not their own evaluation of how the particular material would be viewed by ordinary adults in the whole State. The Court's Instruction No. 1 apparently attempts to clarify that impression to allow the jurors in applying community standards to consider the material in light of their own collective observations in life in the State of Illinois. Neither modification of the last paragraph of IPI Criminal No. 9.57 is necessary.

We conclude that in reading Court's Instruction No. 1 together with all the instructions, particularly the instruction defining obscenity, it is clear that the jury was properly informed that the magazines must not be judged by each juror's own personal standards, but by a community standard of the whole State. We therefore hold that the submission of Court's Instruction No. 1, while unnecessary, was not harmful under the circumstances.

Defendant's final contention is that the Illinois obscenity statute (Ill. Rev. Stat. 1983, ch. 38, par. 11-20) is unconstitutional because it is overbroad both on its face and as it has been applied by our supreme court to specific publications. Specifically, it argues that under the current application of the statute, material that appeals only to a normal, healthy interest in sex but which otherwise contains patently offensive sexual conduct and is utterly without

redeeming social value can be criminally proscribed in violation of the protections afforded to such materials by the first amendment. Defendant primarily bases its contention on the recent case of *Brockett v. Spokane Arcades, Inc.* (1985), 472 U.S. —, 86 L.Ed. 2d 394, 105 S.Ct. 2794.

Recently, this court was presented with the same contention in *People v. Patroff* (1986), 141 Ill. App. 3d 483, 490 N.E.2d 148. We noted in *Patroff* that our supreme court has consistently upheld the constitutionality of the Illinois obscenity statute (141 Ill. App. 3d 483, 491, 490 N.E.2d 148; see also *People v. Ward* (1976), 63 Ill. 2d 437, 440-41, 349 N.E.2d 47; *People v. Morrison* (1985), 138 Ill. App. 3d 595, 598, 486 N.E.2d 345; *People v. Pope* (1985), 138 Ill. App. 3d 726, 734, 486 N.E.2d 350), particularly noting that Illinois courts have rejected the arguments that the statute is unconstitutionally vague or overbroad. (141 Ill. App. 3d 483, 491, 490 N.E.2d 148; see also *People v. Ridens* (1974), 59 Ill. 2d 362, 372, 321 N.E.2d 264.) We also examined whether *Brockett* had any constitutional implications for the Illinois obscenity statute, as asserted by defendant in its brief, and concluded that *Brockett* had no constitutional implications on the statute. In fact, the *Brockett* definition of prurience for the purposes of identifying obscenity, "that which appeals to a shameful or morbid interest in sex" (*Brockett v. Spokane Arcades, Inc.* (1985), 472 U.S. —, —, 86 L.Ed. 2d 394, 406, 105 S.Ct. 2794, 2802), is similar to the Illinois statute's definition of prurient interest. (141 Ill. App. 3d 483, 491-92, 490 N.E.2d 148.) While defendant makes a detained presentation of its argu-

ment and its analysis of the legal approach to obscenity, it fails to raise any new arguments concerning the constitutionality of the Illinois obscenity statute which persuade us to alter our opinion.

For the foregoing reasons, the circuit court is affirmed.

AFFIRMED.

UNVERZAGT and HOPF, JJ., concur.

APPENDIX A

IN THE CIRCUIT COURT FOR THE 16TH JUDICIAL CIRCUIT, KENDALL COUNTY, ILLINOIS

STATE OF ILLINOIS)
) SS.
COUNTY OF KENDALL)

The People of the State of Illinois to all Peace Officers of the State of Illinois.

SEARCH WARRANT

On this day, Timothy McCann, Complainant, has subscribed and sworn to a complaint for search warrant before me. Upon examination of the complaint I find that it states facts sufficient to show probable cause and I therefore command that the following person or place:

Building known as Denmark Bookstore, 1300 Business 30, Aurora, Kendall County, Illinois, premises described in attached Exhibit "A" incorporated herein.

be searched and the following instruments, articles or things which have been used in the commission of, or which

constitute evidence of the offense of OBSCENITY IN violation of Chapter 38, Section 11-20, Illinois Revised Statutes;

BE SEIZED THEREFROM, NAMELY:

Magazines, containing depictions or portion thereof of the following: Cunnilingus, fellatio, anal intercourse, excretion of semen from penis onto other person, masturbation, vaginal or anal insertion of prosthetic devices, insertion of tongue into anus.

I further command that a return and inventory of anything so seized shall be made without unneccary [sic] delay before me or before any Court of competent jurisdiction.

FILED
Jan 23 1984

/s/ Shirley R. Lee
Clerk of the Circuit Court
Kendall County Illinois

/s/ Rex Meilinger
Judge.

Time and date of issuance 1-23-84 at 12:05 P.M.

APPENDIX B

Robert Wunsch being first duly sworn deposes and says as follows:

1. That this affiant is a special investigator for the Kendall County State's Attorneys Office.

2. That this affiant is familiar with a business being conducted on 1300 Business 30, Aurora, Oswego Township, Illinois, known as Denmark Bookstore and situated on the following described premises: See attached Exhibit "A".

3. That this affiant entered the Denmark Bookstore on January 23rd, 1984 and I purchased two magazines, namely "Illegal Entry" and "Golden Girls", which had depictions of the following:

a. magazine entitled "Illegal Entry" depicted fellatio anal intercourse, insertion of fingers into the vagina, insertion of tongue into anus, insertion of prosthetic device into vagina, cunnilingus, excretaion [sic] of semen onto buttocks of female, masturbation.

b. magazine entitled "Golden Girls" depicted masturbation, fellation [sic], anal intercourse, cunnilingus, excretion of semen onto hands of female.

4. That also while in the Denmark Bookstore on January 23rd, 1984 I examined the following books: "Anal Love", "Anal Climax" and "Hot Black Boxes". These magazines showed depictions of one or more of the following: cunnilingus, fellatio, anal intercourse, excretion of semen from penus [sic] onto other persons, masturbation.

5. That all of the magazines above described were offered for sale to the public on January 23rd, 1984.

/s/ Robert A. Wunsch

Subscribed and sworn to before me
this 23rd day of January, 1984.

/s/ Rex Meilinger
Judge

APPENDIX C

COMPLAINT FOR SEARCH WARRANT

Timothy McCann, Complainant, being first duly sworn on oath, now appears before the undersigned Judge of the Circuit Court for the Sixteenth Judicial Circuit, Kendall County, Illinois, and requests the issuance of a Search Warrant to search the person or place as follows: Building known as Denmark Bookstore, 1300 Business 30 Rd, Aurora, Kendall County, Illinois, premises described in attached Exhibit "A" incorporated herein, and seize the instruments, articles or things which have been used in the commission of, of which constitute evidence of, the offense of OBSCENITY IN violation of Chapter 38, Section 11-20, Illinois Revised Statutes.

Said instruments, articles or things being described as follows:

Magazines containing depictions or portion thereof the following: Cunnilingus, fellatio, anal intercourse, excretion of semen from penis onto other persons, masturbation, vaginal or anal insertion of prosthetic devices, insertion of tongue into anus.

Complaint says that he has probable cause to believe, based upon the following facts, that the above listed things to be seized are now located upon the person and/or place set forth above:

See attached affidavits of Timothy McCann and Robert Wunsch as adopted and incorporated herein.

FILED
Jan 23 1984

/s/ Shirley R. Lee
CLERK OF THE CIRCUIT COURT
KENDALL COUNTY, ILLINOIS

Subscribed and sworn to before me,
this 23 day of January, 1984

/s/ (Illegible)

/s/ Timothy J. McCann
Complainant

EXHIBIT B

No. 2-85-739

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Appeal from the Circuit Court of Kendall County
84 CM 282/84 CM 284

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

vs.

SEQUOIA BOOKS, INC.,
Defendant-Appellant.

Honorable Wilson Burnell, Judge Presiding
(Filed August 11, 1986)

PRESIDING JUSTICE NASH delivered the opinion of the court:

After a jury trial defendant, Sequoia Books, Inc., was convicted of obscenity (Ill. Rev. Stat. 1983, ch. 38, par. 11-20) for the sale of three magazines to an undercover police officer and fined $910. Defendant appeals, contending (1) the court erred in refusing to admit municipal ordinances relating to adult materials into evidence; (2) defendant was not proved guilty beyond a reasonable doubt; (3) the obscenity statute is vague and overbroad; and (4) a jury instruction improperly permitted the jury to apply a personal standard of obscenity.

On October 23, 1984, Ronald Henson, a Village of Oswego police officer, purchased two magazines from the Denmark Bookstore in Aurora, Illinois, and then delivered them to Investigator Joel Widell, a Kendall County deputy sheriff. The magazines, "Here's the Beef" and

"Student Bodies," contained graphic depictions of homosexual acts. The following day, he returned to the bookstore and purchased a magazine entitled "Two Way Swingers," which contained exhibitions of bisexual acts. Defendant was charged with two counts of obscenity as to each magazine. Prior to trial, the court denied defendant's motion to dismiss on the grounds the statute defining obscenity (Ill. Rev. Stat. 1983, ch. 38, par. 11-20) was unconstitutionally vague and overbroad.

At trial, Officer Henson identified the magazines and photographs of the interior of the Denmark Bookstore premises, and the materials were admitted into evidence. The State rested its case, and the court denied defendant's motion for directed verdict.

Defendant called as a witness Dr. Roderick Bell, a social scientist and professional public opinion pollster, who had conducted statewide polls regarding sexual materials. Dr. Bell testified he obtained the following responses in three different years to the question, "In your opinion, is it now all right or not all right in the State of Illinois for bookstores that restrict attendance to adults only to sell publications and movies depicting nudity and actual or pretended sexual activities for adults who want to go inside and purchase them?":

	1983	*1980*	*1978*
Response		*Percentage*	
All right	66.6%	63.2%	54.8%
Not all right	22.7%	30.3%	37.3%
Neither	7.1%	6.3%	4.0%
No answer	1.3%	0.3%	3.9%
Don't know	2.2%	—	—

Dr. Carl Hamann, a psychiatrist, testified he examined the magazines in evidence and found the sexual con-

duct depicted fell within normal categories of sexual activity, but would appeal to the prurient interest of some average adults. He also stated the magazines had some educational value. John Breen, a legal investigator, stated he purchased magazines similar to the present magazines at various adult bookstores throughout Illinois. These magazines, which depicted a full range of heterosexual and homosexual conduct, were admitted into evidence. Defendant also offered into evidence certified copies of adult use zoning and permit ordinances from several municipalities throughout Illinois as evidence of contemporary community standards. The court sustained the State's objections to the tendered exhibits.

At the close of the evidence, over defense objections, the court gave Instruction No. 8A to the jury, which states:

> "In determining whether a magazine is obscene applying contemporary community standards you may consider the material in light of your collective observations in life in the State of Illinois, but you must not judge it by your own person standards even if you are personally offended by the material."

The jury found defendant guilty of obscenity as to each magazine and, after denial of its post-trial motions, defendant has appealed.

We consider first whether the trial court erred in refusing to admit municipal ordinances relating to adult materials into evidence. Defendant attempted to place into evidence ordinances from five Illinois municipalities (Springfield, Quincy, Bloomington, Peoria and Urbana) which regulated zoning and employee permits for adult theatres, bookstores and nightclubs. Defendant argues the ordinances were admissible as evidence of the degree of public acceptance of sexually explicit material (Ill. Rev. Stat. 1983, ch. 38, par. 11-20(c)(4)), and are relevant evi-

dence of the statewide community standard for such material. Other jurisdictions have deemed it error for a trial court to deny a defendant the right to introduce otherwise competent exhibits, such as evidence of the availability of obscene materials, which directly relate to any or all of the elements of obscenity. See *United States v. Various Articles of Merchandise* (7th Cir. 1984), 750 F.2d 596, 599; *State ex rel. Leis v. William S. Barton Co., Inc.* (1975), 45 Ohio App. 2d 249, 344 N.E.2d 342.

It is well-established that the admission of evidence lies within the sound discretion of the court and its decision will not be reversed absent a clear showing of abuse of that discretion. (*People v. Ward* (1984), 101 Ill. 2d 443, 455-56; *People v. Frazier* (1984), 129 Ill. App. 3d 704, 709.) Defendant's argument that the existence of the adult use municipal ordinances indicates public acceptance of obscene materials is unsupported. The ordinances it submitted as evidence are not limited to patently obscene materials or sexually explicit materials having no social value. Moreover, the ordinances were clearly not intended by the adopting municipalities as an acknowledgement of the public acceptance of materials deemed obscene. These ordinances were enacted to fulfill the municipalities' obligation to address the zoning problems such bookstores raise, regardless of whether the materials would subsequently be adjudged obscene. As the municipalities enacted these provisions for the limited purpose of zoning and they do not reflect a judgment on the public's acceptance of the materials, we find the trial court did not err in refusing to admit the ordinances into evidence.

Defendant contends next that the State failed to prove it guilty beyond a reasonable doubt because it did

not present any evidence of a statewide community standard and did not rebut defendant's expert testimony and its evidence of a survey of such standards. An identical argument was rejected in *People v. Pope* (1985), 138 Ill. App. 3d 726, where this court noted the jury need not accept the opinion of an expert (see *Merchants National Bank v. Elgin, Joliet & Eastern Ry Co.* (1971), 49 Ill. 2d 118, 122; *People v. Slago* (1978), 58 Ill. App. 3d 1009, 1016); the fact that the jury did not accept the expert's testimony does not mean the jurors failed to apply a community standard. (138 Ill. App. 3d 726, 743.) In light of our prior decision, we need not readdress this issue here. See also *People v. Hall* (1986), 143 Ill. App. 3d 766.

Defendant's other contentions that the trial court erred in its instructions to the jury and that the Illinois obscenity statute does not meet constitutional standards were recently considered by this court in *People v. Sequoia Books, Inc.* (Docket No. 85-504, 2d Dist., filed July 9, 1986), — Ill. App. 3d —. The same arguments relating to an identical instruction and the statute were rejected.

Accordingly, the judgment of the circuit court is affirmed.

AFFIRMED.

STROUSE, WOODWARD, JJ., concur.

EXHIBIT C

(SEAL)

STATE OF ILLINOIS
APPELLATE SECOND DISTRICT
ELGIN 60120

Office of the Clerk
312-695-3750

Appeal from the Circuit Court of County of Kendall

Trial Court Number: 84CM16

THE COURT HAS THIS DAY, 08/19/86, ENTERED THE FOLLOWING ORDER IN THE CASE OF:
Gen. No.: 2-85-0504

People v. Sequoia Books, Inc.

Petition by Defendant-Appellant for rehearing denied.

LOREN J. STROTZ, Clerk

cc: Reno, O'Byrne & Kepley, P.C.
J. Steven Beckett
Honorable Dallas C. Ingemunson
William L. Browers, Deputy Director
Marshall M. Stevens

EXHIBIT D

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

December 4, 1986

Mr. J. Steven Beckett
Reno, O'Byrne & Kepley
P. O. Box 693
Champaign, IL 61820

No. 64138—People State of Illinois, respondent, v. Sequoia Books, Inc., petitioner. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 29, 1986.

EXHIBIT E

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

December 4, 1986

Mr. J. Steven Beckett
Reno, O'Byrne & Kepley
P. O. Box 693
Champaign, IL 61820

No. 64106—People State of Illinois, respondent, v. Sequoia Books, Inc., petitioner. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 29, 1986.

EXHIBIT F

GENERAL NO. 64138

IN THE SUPREME COURT
OF THE
STATE OF ILLINOIS

Appeal from the Appellate Court for the Second District, No. 2-85-504

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee-Respondent,

v.

SEQUOIA BOOKS, INC.,

Defendant-Appellant-Petitioner.

From the Circuit Court of the 16th Judicial Circuit Kendall County, Illinois, No. 84-CM-16

ORDER

THIS MATTER coming on for consideration on the motion of petitioner to stay the mandate of this court pending an application for *certiorari* in the United States Supreme Court.

IT IS ORDERED that the mandate of this court in the above cause is stayed pending the filing of an application for *certiorari* or the expiration of the period within which said application may be filed. If *certiorari* is applied for, and mandate of this court shall, upon proof of such filing being made by affidavit filed with the clerk of

this court, be further stayed pending resolution by the United States Supreme Court of such application. If no such affidavit is filed, the mandate shall, without further order, issue upon the expiration of the time within which *certiorari* may be sought.

FILED Dec. 26, 1986

Supreme Court Clerk

EXHIBIT G

GENERAL NO. 64106

IN THE SUPREME COURT
OF THE
STATE OF ILLINOIS

Appeal from the Appellate Court for the Second District, No. 2-85-739

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee-
Respondent,

v.

SEQUOIA BOOKS, INC.,

Defendant-Appellant-
Petitioner.

From the Circuit Court of the 16th Judicial Circuit
Kendall County, Illinois, No. 84-CM-282, 284

ORDER

THIS MATTER coming on for consideration on the motion of petitioner to stay the mandate of this court pending an application for *certiorari* in the United States Supreme Court.

IT IS ORDERED that the mandate of this court in the above cause is stayed pending the filing of an application for *certiorari* or the expiration of the period within which said application may be filed. If *certiorari* is applied for, and mandate of this court shall, upon proof of such filing being made by affidavit filed with the clerk of

this court, be further stayed pending resolution by the United States Supreme Court of such application. If no such affidavit is filed, the mandate shall, without further order, issue upon the expiration of the time within which *certiorari* may be sought.

FILED Dec. 26, 1986
Supreme Court Clerk

EXHIBIT H

FIRST AMENDMENT
CONSTITUTION OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FOURTH AMENDMENT
CONSTITUTION OF THE UNITED STATES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FOURTEENTH AMENDMENT
CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

EXHIBIT I

Illinois Obscenity Statute
Ill.Rev.Stat. (1983) ch. 38, § 11-20

11-20. Obscenity

§ 11-20. Obscenity. (a) Elements of the Offense.

A person commits obscenity when, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

(1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participate directly in that portion thereof which makes it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or

(4) Performs an obscene act or otherwise presents an obscene exhibition of his body for gain; or

(5) Creates, buys, procures or possesses obscene matter or material with intent to disseminate it in violation of this Section, or of the penal laws or regulations of any other jurisdiction; or

(6) Advertise or otherwise promotes the sale of material represented or held out by him to be obscene, whether or not it is obscene.

(b) Obscene Defınal.

A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes

substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs.

(c) Interpretation of Evidence.

Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience.

Where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that material is being commercially exploited for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

In any prosecution for an offense under this Section evidence shall be admissible to show:

(1) The character of the audience for which the material was designed or to which it was directed;

(2) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect, if any, it would probably have on the behavior of such people;

(3) The artistic, literary, scientific, education or other merits of the material, or absence thereof;

(4) The degree, if any, of public acceptance of the material in this State;

(5) Appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;

(6) Purpose of the author, creator, publisher or disseminator.

(d) Sentence.

Obscenity is a Class A misdemeanor. A second or subsequent offense is a Class 4 felony.

(e) Prima Facie Evidence.

The creation, purchase, procurement or possession of a mold, engraved plate or other embodiment of obscenity specially adapted for reproducing multiple copies, or the possession of more than 3 copies of obscene material shall be prima facie evidence of an intent to disseminate.

(f) Affirmative Defenses.

It shall be an affirmative defense to obscenity that the dissemination:

(1) Was not for gain and was made to personal associates other than children under 18 years of age;

(2) Was to institutions or individuals having scientific or other special justification for possession of such material.

Amended by P.A. 77-2638, § 1, eff. Jan. 1, 1973.

EXHIBIT J

WALTER S. KOZUBOWSKI, CITY CLERK
CITY CLERK'S OFFICE—CITY OF CHICAGO

CHAPTER 194C*

§§ 194C-1 to 194C-7.2

ADULT USE ORDINANCE

194C-1. Title

194C-2. Intent and purpose

194C-3. Definitions

194C-4. Regulated uses

194C-5. Registration

194C-5.1. Permitting operation without registration and certification unlawful

194C-5.2. Form must be displayed

194C-6. Exterior display

194C-6.1. Observance of display from public way prohibited

194C-6.2. Severance clause

194C-6.3. Penalty for violation

194C-7. Consumer Protection

194C-7.1. Price list

194C-7.2. Penalty

SECTION 1. Pursuant to the provisions of the Constitution of the State of Illinois of 1970, the Municipal Code of the City of Chicago is hereby amended by add-

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*New chapter passed Coun. J. 7-7-77, p. 5492.

ing a new chapter thereto to be numbered 194C and known as the Chicago Adult Use Ordinance, as follows:

SECTION 2. Intent and Purpose.

To regulate uses which, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances thereby having a deleterious effect upon the adjacent areas. Special regulation of these uses is necessary to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhood. The primary control or regulation is for the purpose of preventing a concentration of these uses in any one area.

SECTION 3. Definitions.

A. Adult Book Stores. An establishment having as a substantial or significant portion of its stock in trade, books, magazines, films for sale or viewing on premises by use of Motion Picture devices or any other coin-operated means, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to "Specified Sexual Activities," or "Specified Anatomical Areas," or an establishment with a segment or section devoted to the sale or display of such material.

B. Adult Motion Picture Theater. An enclosed building with a capacity of 50 or more persons used regularly and routinely for presenting material having as a dominant theme material distinguished or characterized by an emphasis on matter depicting, describing or relating to

"Specified Sexual Activities" or "Specified Anatomical Areas," for observation by patrons therein.

C. Adult Mini Motion Picture Theater. An enclosed building with a capacity for less than 50 persons used for presenting material distinguished or characterized by an emphasis or matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas," for observation by patrons herein.

D. Adult Entertainment Cabaret. A Public or Private Establishment which is licensed to serve food and/or alcoholic beverages, which features topless dancers, strippers, male or female impersonators, or similar entertainers.

E. "Specified Sexual Activities" is defined as:

1. Human genitals in a state of sexual stimulation or arousal;

2. Acts of human masturbation, sexual intercourse or sodomy;

3. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

F. "Specified Anatomical Areas" is defined as:

1. Less than completely and opaquely covered: (a) human genitals, pubic region, (b) buttock and (c) female breast below a point immediately above the top of the areola; and

2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

§§ 194C-4 to 194C-7

SECTION 4. Regulated Uses.

Regulated Uses include all Adult Uses which include, but are not limited to the following:

Adult Book Store.

Adult Motion Picture Theater.

Adult Mini Motion Theater.

Adult Entertainment Cabaret.

4.1. Adult Uses shall be permitted subject to the following restrictions:

(1) No such Adult Uses shall be allowed within 1000 feet of another existing adult use.

(2) No such Adult Use shall be located within 1000 feet of any Zoning District whch is Zoned for Residential Use.

(3) No such Adult Use shall be located within 1000 feet of a pre-existing School or place of worship.

(4) No such Adult Use shall be located in any Zoning District except a C-2 zoned area.

SECTION 5. Registration.

Registration: The Owner of a building or premises, his agent for the purpose of managing, controlling, or collecting rents, or any other person managing or controlling a building or premises, any part of which contains an Adult Use shall register with the Department of Revenue of the City of Chicago the following information:

(a) The address of the premises.

(b) The name of the owner of the premises and names of the beneficial owners if the property is in a land trust.

(c) The address of the owner and the beneficial owners.

(d) The name of the business or the establishment subject to the provisions of Section 4.

(e) The name(s) of the owner, beneficial owner or the major stock holders of the business or the establishment subject to the provisions of Section 4.

(f) The address of those persons named in paragraph (e).

(g) The date of initiation of the Adult Use.

(h) The nature of the Adult Use.

(i) If the premises or building is leased, a copy of the said lease must be attached.

5.1. It is unlawful for the owner or person in control of any property to establish or operate thereon or to permit any person to establish or operate an adult use without first having properly registered and received certification of approved registration.

5.2. The owner, manager or agent of a registered Adult Use shall display a copy of the Registration Form approved by the Department of Revenue in a conspicuous place on the premises.

SECTION 6. Exterior Display.

6.1. No Adult Use shall be conducted in any manner that permits the observation of any material depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas," from any public way or from any property not registered as an Adult Use. This provision shall apply to any display, decoration sign, show window or other opening.

6.2. If any provision of this chapter or the application of any provision to any item in this chapter, is held invalid, the invalidity of that provision or application shall not affect any of the other provisions of the application of those provisions to other items in this chapter.

6.3. Any person violating any of the provisions of this chapter shall be fined not less than $50.00 (fifty-dollars) nor more than $200.00 (two-hundred dollars) for each offense and each day such violation shall continue shall be regarded as a separate offense.

SECTION 7. Consumer Protection.

7.1. All adult entertainment cabarets shall display at the bar and at each table, counter or other area or place where any food, beverages, goods, wares, merchandise or service is sold, served or provided, a complete list of all prices, fees and charges for all food, beverages, goods, wares and merchandise sold or services rendered. These lists shall be written in clearly visible letters and figures of a size not less than 14 point type. (Passed. Coun. J. 2-15-78, p. 7298.)

7.2. Any person violating any of the provisions of Section 7.1 shall be fined not less than fifty dollars nor more than five hundred dollars for each offense. Each violation of Section 7.1 may be grounds for revocation of any license issued to any such establishment by the City of Chicago. (Passed. Coun. J. 2-15-78, p. 7298.)

STATE OF ILLINOIS,)
) SS.
COUNTY OF COOK.)

I, WALTER S. KOZUBOWSKI, City Clerk of the City of Chicago in the County of Cook and State of Illinois, DO HEREBY CERTIFY that the annexed and foregoing is a true and correct copy of Chapter 194C of the Chicago Municipal Code entitled "Adult Use Ordinance".

I DO FURTHER CERTIFY that the original, of which the foregoing is a true and correct copy, is on file in my office and that I am the lawful custodian of the same.

WITNESS MY HAND and the corporate seal of the said City of Chicago this twenty-sixth (26th) day of March, A.D. 1985.

/s/ Walter S. Kozubowski, City Clerk

Supreme Court, U.S.
FILED
MAR 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1261

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SEQUOIA BOOKS, INC.,

Petitioner,

v.

STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Second District

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

PRAYER

Respondent asks this Court to deny the petition for writ of certiorari to review the judgments and orders of the Illinois Appellate Court, Second District, entered July 9, 1986, and August 11, 1986, affirming petitioner's convictions for obscenity because the petitioner does not present a question that is worthy of review by this Court.

OPINIONS BELOW

The opinions of the Illinois Appellate Court, Second District, which petitioner asks this Court to review are reported as *People v. Sequoia Books*, 145 Ill.App.3d 1054, 495 N.E.2d 1292 (2nd Dist. 1986) and *People v. Sequoia Books*, 146 Ill.App.3d 1, 496 N.E.2d 740 (2nd Dist. 1986) and are contained in the appendix to the petition as exhibits A and B.

JURISDICTION

The petition sets forth the jurisdictional requisites. But as the following argument demonstrates, petitioner has not provided this Court any reason why it should exercise its discretion to grant a writ of certiorari.

STATEMENT OF THE CASE

The petition provides an accurate statement of what this case is about. Respondent's ensuing argument will rely on the facts contained in that argument, as well as facts provided in the appellate court opinions and the record.

REASONS FOR DENYING THE PETITION

THE PETITIONER HAS NOT PRESENTED A QUESTION WORTHY OF REVIEW BY THIS COURT.

A. The Circumstances Surrounding The Search Warrant Do Not Warrant Intervention By This Court.

Petitioner seeks review of the opinion and order rendered on July 9, 1986, for several reasons, each relating to the issuance of the search warrant: 1) that the particular search warrant issued in this cause was invalid as too general, 2) that it was improperly issued since in this cause there was no searching focus conducted by the magistrate on the question of the obscenity of the sought-after magazines, and 3) that the particular seizure conducted in this cause amounted to a prior restraint.

These are not issues which require the voice of this Court, either for further explanation of law or to resolve any conflict on points of law between the state court opinion and opinions of this Court or those from other jurisdictions. Indeed, this Court just fully addressed these warrant concerns—the obligation of the magistrate to focus searchingly on the question of obscenity before issuing a warrant, the obligation to issue a warrant of sufficient specificity, and the obligation to ensure that a search will not amount to prior restraint—just last year in *New York v. P.J. Video, Inc.*, ____ U.S. ____, 106 S.Ct. 1610 (1986).

In *P.J. Video*, this Court explained that the warrant requirement involving seizure of materials presumptively protected by the First Amendment is a little different from those which do not implicate the First Amendment. The trial courts must make sure that certain special conditions have been met by police. For instance, in all cases,

a magistrate may not issue a warrant authorizing seizure of such materials based on the conclusory allegations of a police officer that the sought-after materials are obscene. Rather he must make sure that the complaint for warrant is supported by affidavits setting forth specific facts in order that he may focus searchingly on the question of obscenity.

Furthermore, the courts may not allow the police to rely on the "exigency" exception under circumstances where this would constitute a "prior restraint." Whenever it is apparent that a large-scale seizure of materials would restrict public access to material and thereby amount to a "prior restraint," the court must first provide an adversary hearing on the question of obscenity before the search can take place. But it is a defendant's burden to make a pretrial showing of a "substantial" prior restraint requiring a precedent adversary proceeding. Without such a showing made by defendant, there is no obligation to conduct a pretrial adversary hearing on the question of obscenity.

Aside from these special conditions, warrant applications in instances of a seizure of materials presumptively protected by the First Amendment are the same as those generally. For instance, the magistrate must apply the same standard of probable cause that he uses in other areas of fourth amendment law. This standard was most recently set out in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) and iterated in *P.J. Video*: probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity. *P.J. Video*, 106 S.Ct. at 1616. Any claim of prior restraint has no relevance to the standard of probable cause for the issuance of a warrant to seize the materials—it only means that the police may not rely

on the "exigency" exception but must properly obtain a warrant from a magistrate. *P.J. Video*, 106 S.Ct. at 1615, n.6.

Clearly, petitioner's allegations raise concerns already dealt with last year in *P.J. Video*. Review in this cause would not contribute to the development of that area of law in any new or significant way. It could only rehash the *P.J. Video* principles. Thus, it is clear that the petition does no more than seek intervention by this Court to correct alleged errors in this cause alone.

But this record does not demonstrate the errors he alleges. First, the search warrant was issued after a searching focus conducted by the magistrate on the question of the obscenity. The appellate court in Illinois explained that the issuing magistrate had looked at the complaint for search warrant requesting authority to search the bookstore for magazines which contained depictions for cunnilingus, fellatio, anal intercourse, excretion of semen from the penis onto other persons, masturbation, vaginal or anal insertion of prosthetic devices, and insertion of tongue into the anus. The magistrate looked at the supporting affidavit of Investigator Robert Wunsch, stating that he was in the bookstore, purchased two magazines depicting the explicit acts listed in the complaint, viewed three other magazines which also contained some of these same depictions, and that these magazines were offered for sale to the public. The magistrate was given and looked at the two magazines purchased by Investigator Wunsch for his own examination. And the magistrate looked at the supporting affidavit of Deputy McCann, stating the numerous criminal obscenity charges were pending against various persons as a result of the purchase of materials from the bookstore.

The appellate court concluded that the issuing magistrate had sufficient information to determine that the materials depicting the acts listed in the magazines and exhibited in the two magazines were patently offensive, would probably, as a whole, appeal to prurient interest based on community standards, and would probably be without redeeming social value. In reaching this conclusion, the appellate court relied on *P.J. Video* where this Court upheld the issuance of search warrants on the basis of similar affidavits detailing the character of certain films, including sexual depictions contained in the films, so that the judge could reasonably discern the prurient nature and value of the works even if he did not view the films for himself. *See also Sequoia Books v. McDonald*, 725 F.2d 1091 (7th Cir. 1984), *cert. denied*, 105 S.Ct. 83 (magistrate who issued warrant for seizures from bookstore had probable cause to believe that the materials seized were pornographic where, though he did not have before him copies of any of those materials, he did have a detailed affidavit from a police investigator describing in minute detail nine magazines that the investigator had read in the store).

At bar, the issuing magistrate judge had even more to go on than did the magistrates in *P.J. Video* and *Sequoia Books v. McDonald*, because he had two magazines before him on which to make a judgment as to all three of the obscenity elements. With the affidavits and the magazines, the judge made his own searching focus as to the obscenity questions. And on this focus, he fashioned a warrant authorizing seizure of only materials containing specific explicit acts. Aware of the hard-core materials he himself reviewed and the nature of the bookstore which would sell such hard-core materials, he could be certain that there was virtually no chance that the officer, in executing

his warrant, could seize non-"prurient" materials with "value." Similarly, the Seventh Circuit in *Sequoia Books*, 725 F.2d at 1093, held that when a warrant confines officers to seizing materials containing sexually explicit depictions as described in the search warrant, such a warrant satisfies the requirement of particular description.

Finally, the issuing judge could also be sure there was no possibility of a prior restraint. Although the officers did seize a large number of books, the record shows that only a single copy of each magazine was seized, that the store was allowed to remain open and customers allowed to remain in the store, and the police even told employees that they were not there to close down the establishment. (3/22/84, R. 10, 29). Thus, the police seized some materials for evidentiary purposes only and never denied public access to them. Importantly, petitioner never met a pretrial burden showing substantial or even possible prior restraint. Without that showing, there was no basis on which the issuing judge could call for an adversary hearing on the question of obscenity before authorizing the search.

Therefore, review should be denied because petitioner has not presented any kind of novel or worthy issue nor shown an error that necessitates correction.

B. The Constitution Did Not Compel Admission Of Evidence Of The Adult Use Ordinances Offered By Petitioner.

Petitioner seeks review of the opinion and order rendered on August 11, 1986, claiming that he was entitled under the Constitution to use adult-use ordinances from five Illinois communities to help the jury determine contemporary community standards in Illinois. The premise of this argument is this evidence was necessary because Illinois jurors

have little experience on which to base an opinion of what the contemporary community standard is and need educating. (Petition, p. 18).

But petitioner's premise is flawed. The whole point of the standard of the contemporary community is that a juror does have his own understanding of the community in which he lives and his own knowledge of the propensities of the average person in his community, so that this determination is not dependent on expert evidence. *Hamling v. United States*, 418 U.S. 87, 104-105 (1974); *Smith v. United States*, 431 U.S. 291, 302 (1977). Thus, jurors can assess the standard of the community either without any evidence whatsoever or with evidence of the standard if it can assist them in the resolution. *Hamling*, 418 U.S. at 105-106. A trial court retains wide discretion in its determination to admit and exclude evidence. *Hamling*, 418 U.S. at 108.

In *Smith*, the federal court jury sitting in Iowa had received evidence that the State of Iowa left unregulated the distribution of obscene materials to adults and banned dissemination only to minors. This Court held that the State's obscenity statute was relevant evidence of the mores of the community whose legislative body enacted the statute. Although petitioner relies on *Smith* as applicable at bar, *Smith* never said that zoning ordinances were also relevant evidence of the mores of the community.

Indeed, the state court at bar has already held that the municipal ordinances are *not* relevant to the state standard of the community. The adult-use ordinances sought to be used by petitioner, involving the Illinois municipalities of Springfield, Quincy, Bloomington, Peoria, and Urbana, regulated zoning and employee permits for adult theaters, bookstores, and nightclubs. Petitioner suggested at trial

that they revealed a degree of public acceptance of sexually explicit material in Illinois.

But the Illinois courts disagreed because these ordinances were not limited to patently obscene materials or sexually explicit materials having no social value. Nor did any of these municipalities adopt them as an acknowledgement of the public acceptance of materials deemed obscene. Rather they arose from the municipalities' obligation to address the zoning problems that adult bookstores raise, regardless of whether these bookstores carry materials ultimately adjudged to be obscene. Where the ordinances are for the limited purpose of zoning, and purport no reflection on the public's acceptance of obscene materials, the state court concluded there was no error in refusing to admit them for having no bearing on an Illinois community standard.

Therefore, this claim is not worthy of review on the law or on the facts. The law is already well-settled that no evidence at all is needed for the jury to determine the standard of the community but that such evidence can be used if relevant in a given case. And the facts of this case show that the evidence of zoning ordinances in five Illinois metropolises was not relevant to the question of how an average person in Illinois would assess the three obscenity prongs of prurience, offensiveness, and value. Review on this calim must be denied.

C. This Court Already Has Two Cases Pending Before It Which Present The Issue Whether Community Standards Apply To The Value Element Of The Tripartite Obscenity Test.

Petitioner explains that the constitutionality of the Illinois Obscenity Statute under which he was convicted is presently pending before this Court in *Pope v. Illinois,*

(No. 85-1973), *cert. granted*, 107 S.Ct. 61 (1986) which presents the same question presented now: the statute fails to limit application of contemporary community standards to the first two elements of the tripartite obscenity definition.

Since this issue is already before this Court, there is no need to review it again in this case. Respondent suggests that no action on this petition for writ of certiorari be taken until this Court has resolved the issue in *Pope* and this Court can proceed in this cause in accordance with *Pope*.

CONCLUSION

WHEREFORE, the People of the State of Illinois ask this Court to deny the petition for writ of certiorari because it presents no issue worthy of review by this Court.

Respectfully submitted,

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March 20, 1987

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